

CHAPTER 7:

DISCRIMINATION, THE SEX DISCRIMINATION ACT AND SUPERANNUATION

*Even after July 1 1994, ... the requirement for superannuation to
be non-discriminatory will still be limited It is reminiscent of
St Augustine's plea to God to make him holy ... but not yet.¹*

7.1 Currently, superannuation is explicitly excluded from anti-discrimination laws across the country, for reasons discussed in paragraph 6.18.

7.2 The questions of if, and how, discrimination in the superannuation system should be addressed go to the heart of many of the concerns associated with the adequacy of the retirement incomes policy and its impact on those whose retirement will not follow on from a traditional male employment pattern.

7.3 The idea of fair reward for effort is widely accepted in Australia and unjustified and unreasonable deviations from that guiding principle often attract community dissent.

7.4 The evidence presented to the Committee suggests that while superannuation has improved significantly in the last decade, concern remains about the equity and adequacy of occupational superannuation, particularly for those people whose workforce participation falls outside the traditional 30 to 40 year working life pattern.

7.5 Prior to any discussion of discrimination in the superannuation system, it is important to understand the context within which superannuation functions in relation to this issue. However, it should be noted that superannuation is explicitly excluded from anti-discrimination laws across the country.

The Sex Discrimination Act 1984 and superannuation

7.6 While sex discrimination laws have been enacted, or are in the process of being enacted, in all States and Territories, the purview of this Committee has dictated that attention be focussed on the operation, impact and, if appropriate, remedy of sex discrimination at the Commonwealth level.

¹ Sex Discrimination Commissioner, SW Sub No 89

7.7 The *Sex Discrimination Act 1984* (Cth) (the Act) aims to provide redress for injustices or disadvantages experienced by people because of their sex, marital status or pregnancy and, in relation to dismissal, because of their family responsibilities. It also aims to redress injustice and disadvantages (particularly for women) in access to goods and services, such as superannuation.²

7.8 The operation of superannuation or provident fund schemes was initially exempted from the Act for a two year period. This was extended until, in 1991, a more limited exemption replaced it. After further administrative exemptions, the new sections of the Act relating to superannuation - sections 41A and 41B - came into effect on 1 July 1994. The following areas remain immune:

- reasonably based actuarial or statistical data;
- the provision of dependant superannuation where there is no spouse or children;
- indirect discrimination in relation to vesting, preservation or portability of benefits; and
- discrimination in the terms and conditions of superannuation funds which were in existence prior to implementation of the amendments, provided they have offered their members an option to obtain benefits which do not discriminate in any other way than those granted under the other three exemptions.³

7.9 Guidelines providing more detailed information for the superannuation industry in relation to a number of complex and difficult areas in the provision of superannuation benefits have been produced by the Human Rights and Equal Opportunity Commission (HREOC) in conjunction with a Superannuation Industry Taskforce. These complement earlier Guidelines, released in 1993, which provided general guidance for industry in complying with the provisions of the Act relating to superannuation.⁴

7.10 The *Sex Discrimination Act 1984* defines discrimination as either direct or indirect.

² ibid

³ ibid

⁴ ibid

Direct discrimination

7.11 Direct discrimination occurs when a person receives less favourable treatment than another person because of their sex or marital status. Ms Walpole, the Sex Discrimination Commissioner, provided an example of direct discrimination as a woman being refused superannuation because she is a woman, or if a married woman was treated differently in the terms and benefits of a superannuation scheme than was a married man.⁵

7.12 Other examples of direct discrimination in superannuation cited were:

- lower death and disability coverage for women;
- different retirement provisions for women;
- no payment of benefit to a woman's surviving spouse, or on proving dependency;
- marriage/dowry benefits; and
- differential provisions regarding desertion and imprisonment.⁶

Indirect discrimination

7.13 Indirect discrimination occurs when there is an unreasonable application of a requirement or condition which has a disproportionate effect on people of a particular sex or marital status. In ascertaining whether indirect discrimination has occurred, the impact of a requirement or conditions is the important factor, not the intention of the discriminator.⁷

7.14 According to the Sex Discrimination Commissioner, indirect discrimination is more subtle, in that it recognises that whilst active prejudice may not exist, the effect of a practice may unfairly exclude certain groups from benefits available to other groups.⁸

7.15 The Sex Discrimination Commissioner cited the example of indirect discrimination of a superannuation scheme that denied membership to part-time

⁵ ibid

⁶ Human Rights and Equal Opportunity Commission, *Superannuation and the Sex Discrimination Act 1984: Current Status and Future Directions*, 1994, pp 3-4

⁷ Human Rights and Equal Opportunity Commission, *Background paper: the Sex Discrimination Act and superannuation*, 1995, p 2

⁸ ibid, pp 1-2

workers. Those workers were mainly female, and this action was judged to be unreasonable in the circumstances by the Human Rights and Equal Opportunity Commission.⁹

7.16 Other examples of indirect discrimination cited include:

- no or little entitlement to benefits if employees leave before retirement;
- requirements for very long periods of employment for vesting;
- a reduced benefit to a surviving non-contributing spouse;
- the inability to continue superannuation contributions during maternity leave and periods of workforce absence for child rearing;
- there being 8 per cent of workers earning below the Superannuation Guarantee commencement level, of which most are women; and
- the regressive nature of the tax concessions in the superannuation system, which are of little benefit to low income earners.¹⁰

7.17 The Human Rights and Equal Opportunity Commission also notes that other factors indirectly discriminate against women in relation to the accumulation of superannuation assets:

- women's work patterns typically involve less time in the paid workforce than men's. Women are penalised for non-contributory periods and sometimes are additionally disadvantaged by losing eligibility for membership through breaks in paid employment or by having small contributions from various jobs in various funds eroded by multiple administrative charges. Greater incidence of early retirement (for family reasons) also limits superannuation contributions;
- women's lower earnings mean lower benefits in an occupationally based scheme; and
- women are less likely to have their own superannuation, though they will have contributed to a household's capacity to pay for men's contributions.¹¹

⁹ SW Sub No 89

¹⁰ Human Rights and Equal Opportunity Commission, *Superannuation and the Sex Discrimination Act 1984: Current Status and Future Directions*, 1994, p 3

¹¹ *ibid*, p 4

Why the Sex Discrimination Act exempts certain aspects of superannuation

7.18 According to the Sex Discrimination Commissioner, the exemption from the Commonwealth Sex Discrimination Act was originally intended to apply for two years only.¹² The reasons given for the exemption generally, and its intended removal, are found in the Second Reading Speech on the Sex Discrimination Bill in October 1983:

the Government will not make any regulations until an inquiry into the problems raised by the life insurance and superannuation industry association has been held and the industry's major concerns have been examined and met where appropriate. At the same time, the Government is signalling its intention in principle that the Sex Discrimination Act should - and in due course, will - cover superannuation schemes.¹³

7.19 Review of the operation of the Act is continuing. The Australian Association of Superfunds (ASFA) is a working party participant in the current review of the Act.¹⁴

7.20 Nevertheless, more than ten years after the enactment of the Act, the Committee considers it a proper question to ask the following questions:

Does eliminating discrimination in superannuation mean making retirement incomes equal?

To what extent should the superannuation system be beholden to the existing discrimination?

Are there other areas of discrimination inherent in superannuation that need to be addressed?

Does eliminating discrimination mean making retirement incomes equal?

7.21 Evidence provided to the Committee highlighted an ongoing conundrum as to how discrimination should be assessed. Should it be on the basis of whether formal equality or substantive equality is sought between those people whose workforce participation falls outside the traditional 30 to 40 year pattern and those who do not.

¹² SW Sub No 89

¹³ Second reading speech *Sex Discrimination Bill* October 1983.

¹⁴ SW Sub No 43

7.22 The Queensland Office of the Cabinet illustrated this distinction, saying:

While the Sex Discrimination Amendment Act prevents some forms of discrimination it does not address issues such as the fact that women retire earlier, sustain longer term disabilities and live longer, and that these factors are the basis for calculating lump sums and retirement benefits.¹⁵

7.23 The elimination of discrimination for the purposes of achieving *formal equality* would result in treating people equally without regard to the unequal retirement income outcomes that might be produced.

7.24 In contrast, a goal of achieving *substantive equality* would probably focus on the outcomes, that is, an individual's actual ability to provide for retirement. It would result in removing discrimination so that given people's unequal opportunities, talents and fortunes, the outcome would be substantively equal.

7.25 The evidence submitted to the Committee clearly indicated that neither of these approaches was universally accepted, and that addressing discrimination as a solution to the superannuation problems for people with broken work patterns would require a path to be negotiated which lay somewhere between the two.

7.26 It is the Committee's view that there should be no pretence that all Australians will receive an identical amount of superannuation upon retirement. As superannuation is occupationally based, and the amount of income earned typically varies between individuals, the amount of superannuation one person receives upon their retirement will invariably be different from the next person.

To what extent should the superannuation system be beholden to the existing discrimination?

7.27 Evidence presented to the Committee reflected a broad range of opinions as to the extent that the superannuation system could, and should, be beholden to existing discrimination.

7.28 Dr Olsberg, from the University of New South Wales, argued that while compulsory universal superannuation has appeared to eliminate direct discriminatory practices, indirect discrimination remained.¹⁶ She argued that 'making retirement income dependent upon occupational income ... is a masculine concept that has been given virility through legislation' and that occupational superannuation would remain 'gender biased so long as unpaid

¹⁵ SW Sub No 48

¹⁶ SW Sub No 9

caring roles, which are enormously valuable to society and absolutely necessary, received no recognition whatsoever in terms of retirement income'.¹⁷

7.29 Dr Olsberg concluded that 'any retirement income savings scheme that is [dependent on paid employment] contains an inbuilt structural bias against women'.¹⁸

7.30 The Queensland Office of Cabinet supported this view, submitting that 'inherent discrimination is evident in the foundation blocks of superannuation in Australia ... the original design of superannuation was that the end result of participation was a comfortable lifestyle when the worker was of retirement age, which is based on men's continuous work patterns and men's average earnings'.¹⁹ Many others who appeared before the Committee or presented submissions also supported this position.²⁰

7.31 On the other hand, the majority of superannuation providers and administrators saw the problems of discrimination largely attributable to factors beyond the boundaries of superannuation administration. Some providers did agree with the need and appropriateness of reform, particularly in areas concerning the different rates of payment for male and female annuities. This is discussed in Chapter 8.

7.32 The Insurance and Superannuation Commission (ISC) identified lower gains from occupational superannuation for women as not stemming from 'discriminatory superannuation rules as such, but from traditional patterns and practices in the family, society and the workplace that result in lower lifetime earnings for many women' and argued that 'major changes in patterns of work and social life ... are likely to substantially reduce the differences between male and female participation rates in the full-time workforce and between their lifetime earnings'.²¹

7.33 In evidence before the Committee, the ISC argued that, because 'discrimination emerging in superannuation is primarily a consequence of differences elsewhere, ... a logical consequence of what is occurring elsewhere ... addressing issues in the superannuation context is not addressing the root cause'.²² The ISC was of the view that 'the changes [to the superannuation

¹⁷ Evidence, pp 218-219

¹⁸ SW Sub No 9

¹⁹ SW Sub No 48

²⁰ SW Sub Nos 33, Alexander E; 47, BPW Australia; 57, Sinha T; 58, The Women's Legal Resource Centre

²¹ SW Sub No 37

²² Evidence, pp 627-628

system to date] have minimised the discrimination that is involved in an occupationally based superannuation system'.²³

7.34 The Committee supports the position that the superannuation must not be beholden to the indirect discrimination. It is strongly of the belief that where discrimination is found to be unjustified, it should be remedied as soon as practicable. It is on this basis that the Committee supports withdrawal of the exclusion of the issues of vesting, portability and preservation from the *Sex Discrimination Act 1984*.

Vesting, portability and preservation

7.35 Three areas of superannuation which remain immune from the *Sex Discrimination Act 1984* are those of vesting, preservation and portability.²⁴ Ms Walpole recommended the removal of these exemptions.²⁵

- *Vesting*

7.36 Many women have fragmented working lives, and vesting and portability are considered 'critical issues' in addressing these problems. Ms Walpole submitted:

Vesting is the key area in discriminating between the final benefits received by men and women. While the SGC and industry funds generally provide for immediate 100% vesting of employer contributions, there remain large numbers of women with additional super through their membership of employment sponsored funds in the public and corporate sectors, where long vesting periods persist.²⁶

7.37 In the Commonwealth Public Service schemes, the vesting and preservation of benefits are important features. The Commonwealth Superannuation Scheme (CSS) provides for full vesting and preservation of the employer financed portion of the benefit after 5 years on the election of the exiting member. (Most CSS members will have fully vested benefits as from 1 July 1995.) The Public Sector Superannuation scheme (PSS) has provided full vesting of all benefits since 1 July 1992.²⁷

²³ Evidence, p 630

²⁴ *Sex Discrimination Act 1984*, Section 41A (1) (b) (iii)

²⁵ SW Sub No 89

²⁶ *ibid*

²⁷ SW Sub No 40

7.38 In the industry overall, ASFA submitted that the move to vesting was inhibited prior to 1983 by the lack of rollover facilities and preservation requirements, but 'since the introduction of rollover facilities the pace of improvements to vesting has been faster'. It believed that 'any mandatory vesting requirements would be difficult to design' and would encourage employers to not make any contributions above the minimum required under the SG.²⁸ Rather it felt that 'employers should be encouraged to continue to move to a higher level of vesting for voluntary employer superannuation', although exactly how this encouragement could be given was not examined.

7.39 There was also the views from consumer groups. For example, the Shell Superannuation Rights Committee recommended compulsory full vesting after a qualification period of 4 to 5 years²⁹, while the Australian Education Union advocated full vesting of employer contributions for every individual to apply on resignation, invalidity, retrenchment, dismissal, death and retirement.³⁰

7.40 Ms Walpole was strong in her attitude of vesting as a matter of discrimination:

Vesting, it seems to me, is really quite crucial. All the ABS data indicates to us that not only do women spend a shorter period of time in the workforce but they spend shorter periods in time in each particular job. The longer the vesting time, of course, the less likely they are ever to receive the employer contributions. We have argued in different contexts that this is clearly a situation where issues of indirect discrimination became quite important.³¹

She was quite clear that there was indirect sex discrimination with regards to vesting.³²

7.41 Ms Walpole discussed her proposal to have the superannuation exemptions removed from the Act, with vesting and portability being the first priority. She said she wished to 'collect some more information, and have some more discussions with industry', and indicated that 12 months was an appropriate time within which the remaining exemptions for superannuation should be removed from the Act.³³

²⁸ SW Sub No 43

²⁹ Collins C, SW Sub No 80

³⁰ SW Sub No 93

³¹ Evidence, p 643

³² Evidence, p 653

³³ Evidence, pp 652, 653

- *What about portability*

7.42 The significance of the link of portability with vesting in the priorities of the Sex Discrimination Commissioner were expressed in Ms Walpole's submission:

While ever funds allow for no vesting of the employer's contribution, until [a] certain length of service...women with family or carer responsibilities will pay a high price. Sex equality in pensions becomes even less likely if such funds limit portability, thus effectively hitting women with a double whammy. They can't get up the years required for vesting and their employment continuity is constantly underestimated because they can't take what they have accumulated to their next employer.³⁴

7.43 Other evidence was also strongly supportive of portability.³⁵ Essentially, portability is helpful with the small accounts problem and in assisting contributors to 'own' their superannuation. Where contributors are able to roll their benefits into a new employer's scheme there is clearly an incentive for women with intermittent work patterns to participate in superannuation, as well as it being more appropriate to their needs.³⁶

7.44 From the industry's point of view, ASFA contended that portability is sometimes misunderstood and confused with vesting.³⁷ Examples of this may be where the lower vesting of amounts above the SG are seen as a portability issue, or where funds provide deferred retirement benefits as an alternative to paying out the vested benefit when the member leaves (such as in many public sector plans). ASFA considered that:

The problem of portability or 'consolidation' of superannuation amounts in one fund is small compared to the likely gains from deferring a benefit.³⁸

7.45 It was said there was good economic sense in encouraging deferred benefits, in that portability of benefits 'may create liquidity and short term solvency constraints on funds investment policies'.³⁹

³⁴ SW Sub No 89

³⁵ Examples see SW Sub Nos 12, Malone A, 24, Australian Education Union (Tasmanian Branch), and 30, Marcus J

³⁶ SW Sub No 24

³⁷ SW Sub No 43

³⁸ *ibid*

³⁹ *ibid*

7.46 The Committee considers that the issue of so-called deferred benefits is distinct from portability. Whether vested contributions remain with the same fund or are withdrawn and transferred to another fund, they are still required at law to be preserved for retirement, unless under the \$500 limit.

7.47 It is important in the context of portability that easy and inexpensive transfer of accumulated contributions between funds be facilitated. The Committee examined the question of transfer protocols in its Fifteenth Report *Super Guarantee - Its Track Record*, and recommended the Government ensure that appropriate transfer protocols are adopted by all participating funds, and added:

Once the transfer protocol is implemented, fees should be set at a level which reflect minimum cost to the member. *The cost should not be punitive and should not hinder portability.*⁴⁰

7.48 The evidence of this inquiry has confirmed the Committee's view that all superannuation members should have access to cost effective portability.

7.49 The Committee reiterates its recommendation on transfer protocols and believes that accumulation schemes should move to full portability.

Recommendation 7.1:

The Committee recommends that the Government ensure that appropriate transfer protocols are adopted by all accumulation funds accepting compulsory contributions.

• *And preservation*

7.50 The *Superannuation Industry (Supervision) Act 1993* (SIS) essentially provides that members of a fund cannot access the money in their superannuation account.

7.51 However, if a person has a benefit of less than \$500 when they leave an employer, access to that amount is permitted. This is a deficiency in current policy which facilitates against those with broken work patterns being encouraged to build up their superannuation entitlement on retirement.

⁴⁰ Fifteenth Report, p 69

7.52 The Committee confirms its recommendation in its Fifteenth Report, that, subject to the small accounts problem being properly rectified, access to preserved amounts of less than \$500 should be removed.⁴¹

Recommendation 7.2:

The Committee recommends that the exemptions relating to vesting, portability and preservation, together with all other exemptions relating to superannuation in the *Sex Discrimination Act 1984*, be removed before the end of March 1997.

Recommendation 7.3:

The Committee recommends that the superannuation legislation be amended to require immediate vesting of all employer contributions.

Reversionary Pensions

7.53 These are pensions which are provided by some funds to the surviving spouses of those superannuants who die while in receipt of a pension. Normally the reversionary amount is less than that of the original pension and it was alleged during the inquiry that this is both inequitable and discriminatory because it is usually a women who is the surviving spouse.⁴² It was pointed out however, that such arrangements are not directly discriminatory since a surviving male spouse would also receive the same reduced benefit.⁴³

7.54 Mr Jack Bromley said this practice mitigated against the policy of encouraging pension schemes rather than taking lump sum benefits, since a surviving spouse would have access to the full lump sum. Mr Bromley considered:

⁴¹ Fifteenth Report p 79

⁴² Bromley J, SW Sub No 78

⁴³ ASFA, SW Sub No 78

[t]hat the lifetime of contributions to a fund is a joint effort by husband and wife or partner and these contributions should be applied equally on the death of either party.⁴⁴

7.55 It was said to be unfair that should the superannuant die the surviving spouse received only a percentage of the pension, whereas should the other party die the pension was not affected. One suggested solution was to pay separate pensions to the superannuant and spouse.⁴⁵ When one partner dies the other's pension could continue. The Committee considers the structure of reversionary pensions as a matter for individual funds.

Are there other areas of discrimination inherent in superannuation that need to be addressed?

7.56 The Committee heard evidence that heterosexual married and de facto couples are often treated more generously by superannuation funds when compared to single people or same sex couples. It was put to the Committee that this practice was particularly evident in the administration of death benefits. Given the complexity of this issue, it has been dealt with in more detail elsewhere in the report.

7.57 The Committee also heard evidence on the failure of employers of outworkers in the clothing industry to pay superannuation.⁴⁶ The Committee is aware of the ongoing concern surrounding the employment conditions of some outworkers and notes the 1995-96 Budget announcement of \$33 million to disseminate information on outworker entitlement in the textile, clothing and footwear industries.⁴⁷ The Senate Standing Committee on Economics is currently conducting an inquiry into garment industry outworking.

⁴⁴ SW Sub No 78

⁴⁵ Eyles R, SW Sub No 71

⁴⁶ Textile Clothing and Footwear Union of Australia, SW Sub No 95

⁴⁷ Assistant Minister for Industrial Relations, SW Sub No 88